

Fair Political Practices Commission

Memorandum

To: Chairman Randolph, Commissioners Blair, Huguenin, Leidigh, and Remy

From: William J. Lenkeit, Senior Commission Counsel, Legal Division
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Date: December 26, 2006

Subject: *In re Fulhorst* Opinion Request; O-06-193

I. EXECUTIVE SUMMARY

This Opinion request, received from Stacey Fulhorst, Executive Director of the San Diego Ethics Commission, concerns what rules apply, under the current statutes, to certain enumerated types of payments made by political parties for member communications (copy of request attached). The request seeks, in effect, the Commission's determination as to whether or not the current rules, as applied by the statutes, are sufficiently clear and comprehensive or whether additional clarification is needed from the Commission, either in the form of an Opinion or by regulation. This memorandum presents the factors and issues relevant to that determination.

Government Code section 83114 states that any person may request the Commission to issue an opinion with respect to his or her duties under the Political Reform Act ("Act").¹ Once a request is granted, the Commission shall hold a hearing on the opinion request, and any interested person may submit memoranda, briefs, arguments or other relevant material regarding the opinion no later than 5 days prior to the Commission meeting at which the matter will be heard. (Regulation 18322(c).) The person requesting the opinion may present oral testimony at the hearing on the opinion request and any other interested person may, upon request, be permitted to present oral testimony. (Regulation 18322(d).)

If the Commission decides to issue an opinion, it shall adopt the opinion at a public meeting. Generally, the adoption of the opinion is scheduled for the next scheduled Commission meeting following the meeting at which the Commission decides to issue an opinion. At this meeting, the Commission is being asked to decide whether or not to issue an opinion on the issues presented herein. If the Commission decides that regulatory action is preferable to the issuance of an opinion it may, alternatively, direct

¹ Government Code sections 81000-91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All references are to the Government Code.

staff to research the issues presented and return at a later meeting with proposed regulatory language addressing the issues presented.

II. BACKGROUND

Section 85312, enacted by Proposition 34 and later amended by Senate Bill 34, provides that payments made by an organization for communications to its members supporting or opposing a candidate or a ballot measure are not contributions or expenditures. Ordinarily, payments for communications supporting or opposing a candidate or ballot measure are reportable contributions or expenditures under the Political Reform Act (the “Act”). This section provides an exception for communications by an organization to its members.² In creating this exception, section 85312 operates to prevent certain entities from qualifying as committees under the thresholds established in section 82013, thereby preventing them from becoming subject to the Act’s provisions regarding campaign reporting and contribution limits as a result of payments made for such purposes.

As amended, section 85312 provides:

“For purposes of this title, payments for communications to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purposes of supporting or opposing a candidate or ballot measure are not contributions or expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. *However, payments made by a political party for communications to its members who are registered with that party which would otherwise qualify as contributions or expenditures shall be reported in accordance with Article 2 (commencing with Section 84200) of Chapter 4, and Chapter 4.6 (commencing with Section 84600), of this title.*” (Emphasis added.)

The first sentence of the section was enacted as a result of Proposition 34. The second sentence, identified above in italics, was added by the legislature as a result of SB 34, effective September 4, 2001 (Stats. 2001, Ch. 241). The purpose for the new language was to clarify that payments made by political parties were to continue to be reported under the Act’s reporting requirements.

The Commission adopted regulation 18531.7 (copy attached) effective October 31, 2002, to implement the statute. The regulation provided definitions for “organization” and “members” and addressed what payments for member communications would be subject to the statute, and it included a provision that recipient

² “Member communications” include communications to “members,” “employees,” and “shareholders” of an organization or families of those persons and is the colloquial name given to the provisions of section 85312.

committees subject to the reporting requirements of Chapter 4 would continue to report any payments they made as ordinary expenditures.

However, because the language added to the statute by SB 34 contained a specific provision requiring reporting of member communications by political parties to members registered with the party, regulation 18531.7 did not address this group. (See Staff Memoranda to Commission, dated March 7, 2002, and July 26, 2002.)

On June 22, 2006, Ms. Fulhorst, requested staff advice regarding questions raised concerning payments made by political parties for “member communications.” Because the request presented issues requiring a policy interpretation best addressed through a Commission Opinion or regulation, staff declined to provide advice and suggested that Ms. Fulhorst request a Commission Opinion under Government Code section 83114(a). On September 8, 2006, Ms. Fulhorst submitted her request for a Commission Opinion (copy attached). On October 12, 2006, the Executive Director granted that request.³

III. EXISTING LAW & ISSUES PRESENTED

Pursuant to the provisions of section 85312 and regulation 18531.7 implementing provisions of that section, payments made by an organization to its members for the purpose of supporting or opposing a candidate or ballot measure are not contributions or expenditures.⁴ However, section 85312 further provides that payments made by a political party for communications to its members that would otherwise qualify as contributions or expenditures shall be reported in accordance with Chapter 4 and Chapter 4.6 of the Act.

With respect to the language added by the legislature as part of the SB 34 amendments in 2001, the only indication as to the intent of this language can be found in the legislative counsel’s digest provided with the June 28, 2001, amendments to the bill, which were the last amendments made to this section and contain the final language incorporated into section 85312. The legislative counsel’s digest states that the amendment “would require that payments by a political party for communications to registered party members that would otherwise qualify as contributions [or presumably, expenditures] be reported in accordance with the provisions governing the filing of periodic campaign reports, and governing the filing of reports online or electronically with the Secretary of State.”

³ This item was originally set to be heard at the December 2006 Commission meeting but was rescheduled for the January 2007 Commission meeting at the request of Ms. Fulhorst.

⁴ Subdivision (f) of regulation 18531.7 expressly provides that if a payment is made by a recipient committee, which is already subject to the campaign reporting requirements of Chapter 4 of the Act, the payment is reportable in accordance with the requirements of sections 84211, subdivision (b), (i) and (k)(1), (2), (3), (4), and (6). Therefore, recipient committees must report these payments as ordinary expenditures as specified in the regulation. (Also see section 84211(e); Staff Memorandum of March 7, 2002, and *Olson* Advice Letter, No. I-05-239.)

In other words, irrespective of the first sentence of section 85312, for the reporting purposes of Chapters 4 and 4.5 of the Act, payments made by political parties for member communications were treated no differently than they had been treated before the passage of Proposition 34. Consequently, the exception with respect to political parties' payments for member communications was limited to other provisions of the Act, including the contributions limit of Proposition 34 (even though Proposition 34 placed no contribution limits on payments made by political parties to candidates for elective state office).

While this may seem as if the exception for political parties applied only to a rule that did not apply to them, it does become relevant for local elections in jurisdictions that have imposed their own contribution limits and for purposes of using "soft money" contributions to support candidates through member communications. If payments made for member communications by political parties are not contributions, except for the reporting purposes of Chapters 4 and 4.5 of the Act, then these payments are not subject to local contribution limits.⁵

While Proposition 34's provisions did not place any restrictions on the amount political parties could contribute to candidates, it was not without some restrictions applicable to amounts they could receive for certain purposes. Section 85303(b) provides:

"(b) A person may not make to any political party, and a political party committee may not accept, any contribution totaling more than twenty-five thousand dollars (\$25,000) per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. *Notwithstanding Section 85312, this limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate's candidacy for elective state office.* (Emphasis added.)

Thus, section 85303(b) prohibits funds received by a political party committee in excess of \$25,000 from any one person from being used "for the purpose of making contributions for the support or defeat of candidates for elective state office," and this limit is applicable to payments made by the party for member communications if the payment is made at the behest of a candidate for elective state office.⁶ In other words, the

⁵ The issue of the application of the Act's provisions with regard to local ordinances was addressed by the Commission in *In re Olson*, 15 FPPC Ops. 13 (see attached). In that opinion, the Commission found a Los Angeles City Ordinance subjecting political parties to filing requirements for member communications to support or oppose candidates in city elections preempted by the Act under section 81009.5(b) insofar as they imposed "additional of different" filing requirements on state party committees.

⁶ However, section 85303(c) provides that a political party committee may receive unlimited contributions "provided the contributions are used for purposes other than making contributions to candidates for elective state office."

limit imposed by this section applies to any portion of the contribution received by the party and expended on member communications (and therefore not otherwise subject to contribution limits) if, and *only* if, the expenditure made by the political party is made at the behest of a candidate for elective state office.

Additionally, because of the express exception to the member communications rule provided in section 85312 for payments made by a political party to communicate with its members, these payments continued to be reportable as either contributions or independent expenditures to the extent that the payments qualified as either. A payment made for a communication supporting or opposing a candidate qualifies as a contribution if it is made at the behest of a candidate or committee. (Section 82015(b)(2).) A payment made for a communication supporting or opposing a candidate qualifies as an independent expenditure if it is not made at the behest of a candidate or committee. Under regulation 18225.7(a), a payment is made at the “behest of” a candidate if it is made: “... under the control or at the direction of, or in cooperation, consultation, coordination, or consent with, at the request or suggestion of, or with the express, prior consent of. (See *Fulhorst* Advice Letter, No. I-05-161, attached.)”⁷

The language adopted in section 85312 concerning member communications provided very little guidance as to how its provisions were to be applied. It did not define “organization.” It did not define “member.” It did not even state who needed to make the payment for the communication to an organization’s members for the exception to apply. These were some of the issues addressed by the Commission in adopting regulation 18531.7 to implement the statute’s provisions.

Regulation 18531.7(a) provides the definition for the terms “organization” (other than a political party), “member,” “shareholder,” and “family.” Therefore, it is clear that the provisions of the regulation are not applicable to political parties.⁸ The remaining provisions of regulation 18531.7(a) address: qualification of organizations with a limited number of members (subdivision (b)); what constitutes a “payment for communications,” (subdivision (c)(1)); and a safe harbor for payments made for communications inadvertently directed to nonmembers (subdivision (c)(2)); payments made from nonmembers for communications to members, (subdivision (d)); payments made at the behest of a candidate or committee, (subdivision (e)); reporting requirements for committees organized under section 82013 (subdivision (f)); and applicability of the provisions of section 82013 to communications supporting or opposing local candidates and ballot measures (subdivision (g)).

In addition, because the provisions for member communications by political parties were subject to a different set of rules, as provided by the statute, the regulation’s

⁷This letter also contains an in depth discussion of how such payments are to be reported in local elections.

⁸ See also the *Hiltachk* Advice Letter, No.A-02-233, which stated “this section of the regulation [18531.7(a)] defines “organization” in a manner that excludes a political party from the ambit of the regulation. Accordingly, the California Republic Party is not affected by this regulation.”

provisions were geared only towards establishing rules for payments made by other organizations for member communications in determining the types of payments that qualify under the member communications exception. Some of the situations addressed in the regulation may not be fully applicable to political party member communications or are already subject to statutory interpretation.

This request seeks the Commission opinion as to how payments for political party member communications are to be treated when they fall under the same parameters as those enumerated in the regulation. Because the regulation is not applicable, and there is no regulation addressing payments for member communications by political parties, the essential question in this opinion becomes – “Does the Act provide sufficient guidance, absent a regulation specifically addressing political party member communications, to determine what payments are subject to the exception and what payments are not? If not, should the Commission develop specific rules applicable to payments made by political parties for member communications?”

The first and second questions posed in this request involve payments made for member communications under circumstances addressed in subdivision (c)(2) of the regulation; questions three, four, five, six, seven, and nine of the request concern factors addressed in subdivision (d) of the regulation; and question eight has to do with the type of payments addressed by subdivision (e) of the regulation. The final question implicates the provisions of subdivision (g).

II. QUESTIONS PRESENTED

With respect to political parties that make payments for member communications that support or oppose local candidates or ballot measures, what rules apply under the circumstances addressed below:

Question 1: If a political party makes a payment for a member communication and the communication is inadvertently delivered to one or more nonmembers, is that payment considered a contribution or expenditure?

This question concerns how to treat payments made by political parties for member communications if the communications are inadvertently sent to nonmembers. For organizations other than political parties, this issue is addressed in regulation 18531.7(c):

“(2) Any payment for costs directly attributable to a communication from an organization inadvertently delivered to persons other than members, employees, or shareholders or families of members, employees, or shareholders provided those costs do not exceed \$100 or 5% of the total cost of the communication to an organization's members, employees, or shareholders or families of members, employees, or shareholders, whichever is higher, notwithstanding subdivision (c)(1) above.”

These provisions provide a safe harbor for a limited number of communications sent to nonmembers, so that a few inadvertent communications to nonmembers does not result in a contribution of the full or partial cost of the communication, simply because a few nonmembers happened to receive it.

However, because the provision does not apply to political parties, currently, any communication made by a political party to a nonmember, would *not* be treated as a member communication and would *not* fall within the statutory provisions under section 85312. These payments would, therefore, be treated the same as any other expenditure made by the political party. (Section 82025.)

If the Commission were to adopt a similar provision as subdivision (c)(2) of regulation 18531.7 to political parties, the answer to question one would depend on the number of nonmembers who received the mailer and, if less than the determined threshold, the answer would be “no.”

Question 2: In the context of question number one, is it relevant how many nonmembers receive the communication, or how much of the costs of the communication are attributable to nonmembers?

Given the answer to Question 1, because neither the statute nor the regulations establish a safe harbor for any inadvertent member communications made to nonmembers by political parties, the only relevance in determining how many nonmembers receive the communication would be to establish the cost of the payment made.

Question 3: If a political party makes a payment for a member communication using funds from an individual who is not registered with the party, is that payment considered a contribution or expenditure?

Under section 85312 any payments made by a political party for member communications “which would otherwise qualify as contributions or expenditures shall be reported in accordance with” the reporting provisions of Chapter 4 and Chapter 4.6 of the Act. There is no distinction as to how payments received by the party from members and nonmembers are to be treated.⁹ Therefore, if the payment for the member communication qualifies as contribution or expenditure it is reported as such according to the provisions of sections 84200 et seq. and 84600 et seq. (See *Boling* Advice Letter, No. A-02-262; *Fulhorst* Advice Letter, *supra*.)

Accordingly, the answer, under current law, is that for reporting purposes, the payment would be a contribution or expenditure to the extent that it qualified as such

⁹ “Member,” with respect to a political party organization, is not defined in the Act, although the statute suggests and the interpretation has always been to apply the term to persons registered with the party.

irrespective of from whom it was received. For contribution limit purposes under section 85303(b) regarding the application of the limits to payments “made at the behest of” there is, likewise, no difference between payments received from members or nonmembers.

Question 4: If a political party makes a payment for a member communication using funds from a business entity or organization (which as a non-individual is incapable of registering to be a member of a political party), is that payment considered a contribution or expenditure?

The answer to this question is the same as the answer to question 3. Because no distinction is made between members and nonmembers for purpose of payments made to political parties for member communications, all such payments would be treated equally no matter from whom they were received, whether individuals or entities, and would be reported as contributions or independent expenditures by the political party to the extent that they qualify as such in accordance with the provisions of section 85312.

Question 5: If an individual who is not registered with a political party makes a non-monetary donation in support of a member communication by that political party, is the non-monetary donation considered a contribution or expenditure?

The non-monetary donation would be reported as a contribution received by the party, just as any monetary contribution received by the party would also be reported. These contributions, whether monetary or non-monetary, would also be subject to the contributions limits applicable under section 85303. However, with respect to the member communication itself, the payment would be a reportable expenditure (see question 1.)

Question 6: If a business entity or organization (which as a non-individual is incapable of registering to be a member of a political party), makes a non-monetary donation in support of a member communication by that political party, is that non-monetary donation considered a contribution or expenditure?

The answer to this question is the same as question five.

Question 7: If an individual who is a member of a political party makes a payment directly to a vendor for services rendered in connection with the political party’s member communication, is that payment considered a contribution or expenditure?

The individual’s payment to the vendor is an in-kind contribution to the party. This would be treated as any other contribution received by the party used in connection with the political party’s member communication, and the answers provided under questions 3 through six are equally applicable here as well.

Question 8: If a political party makes a payment for a member communication at the behest of a candidate, is that payment considered a contribution to the candidate?

The payment, which would “otherwise qualify as a contribution” because it is made at the behest of the candidate, would be a reportable contribution as provided in section 85312. Additionally, it would be subject to reporting and the contribution limits on political parties imposed by section 85303, notwithstanding the fact that the payment is made for member communications, because those limits are expressly made applicable to “contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office ...”

However, the limitations only apply to candidates for elective state office and only limit the party from spending any amount over \$25,000 received from any one person if the member communication is made at the “behest of” the candidate.

Question 9: If a candidate tells his or her supporters to make a payment directly to a political party and to earmark those payments for member communications supporting the candidate, are such payments considered contributions to the candidate?

Yes. The payments made by the candidate’s supporters to the party are considered contributions to the candidate under section 82015(b)(2). The payments are considered to be made at the “behest of” the candidate because they are being made “at the direction of” the candidate. (See regulation 18225.7(a).) The fact that the party may or may not use the payments for member communications is irrelevant to the analysis of whether the payments made by the candidate’s supporters are contributions to the party or contributions to the candidate. The member communication provisions apply only to payments made *by* the party (or, in other contexts, organizations) and not to payments made *to* the party or organization.

Question 10: May a local jurisdiction enact a law defining as a “contribution” any payment for member communications that is made at the behest of a candidate and subjecting such payments to local contribution limits?

It is not clear whether this question only addresses political party member communications or extends to member communication by other organizations. To the extent that it may apply to other organizations, regulation 18531.7(e) already states that a payment made at the behest of a candidate for member communications is not a contribution, and a local jurisdiction may not enact a different definition if that definition would impose additional or different filing requirements. Section 81009.5(b) provides:

“(b) . . . no local government agency shall enact any ordinance imposing filing requirements additional to or different from those set forth in Chapter 4 (Commencing with Section 84100) for elections held in its jurisdiction unless the additional or different filing requirements apply only to candidates seeking election in that jurisdiction, their controlled committees or committees formed or existing primarily to support or oppose their candidacies, and committees formed or existing primarily to

support or oppose a candidate or to support or oppose the qualification of, or passage of, a local ballot measure which is being voted on only in that jurisdiction, and to city or county general purpose committees active only in that city or county, respectively.”

The same is true with respect to political parties’ member communications. Section 85312 defines for what purposes payments are to be treated as contributions when made for membership communications. Section 85303(b) states that contribution limits imposed therein apply to “contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office” for member communications related to his or her candidacy. A local jurisdiction may apply these rules in adopting local contribution limits, but to the extent that any definition would apply other than as allowed for in section 81009.5, the alternative definition would be prohibited. (See *In re Olson*, 15 FPPC Ops. 13.)

Staff Recommendation: Staff recommends that the Commission not issue an opinion but that the Commission direct staff to further examine the need to develop regulatory guidelines for implementation of the member communications provisions relating to political parties. Membership communications issues are currently being addressed as part of the 2007 regulatory package and are scheduled for prenotice hearing in July and adoption in September, with an Interested Persons meeting scheduled for May.

Attachments:

September 28, 2006, Request for Opinion
Fulhorst Advice Letter, I-05-161
In re Olson, 15 FPPC Ops. 13
Regulation 18531.7